Penang Development Corporation v Khaw Chin Boo & Anor

HIGH COURT (PENANG) — CIVIL APPEAL NO 11–63–87
MOHAMED DZAIDDIN J
14 JANUARY 1993

Civil Procedure *— Pleadings — Statement of claim — Whether there was a reasonable cause of action*

Contract *— Sale and purchase of land— Delay in the delivery of vacant possession — No time specified for performance — What constituted a reasonable time — Contracts Act 1950 s 47*

Contract *— Sale and purchase of land — No time specified for performance — Written notice to complete necessary as time was not of the essence*

The plaintiffs claimed for damages for late delivery of vacant possession of a unit of flat which they had purchased from the defendants pursuant to a sale and purchase agreement. The agreement was silent regarding the date of delivery of vacant possession and in this case, possession was given more than three and a half years after the execution of the agreement. In their amended statement of claim, the plaintiffs submitted that vacant possession must be delivered within a reasonable time and they relied on the 24 months' period under the Housing Developers (Control and Licensing) Regulations 1982 ('the Regulations'). The defendant replied that the amended statement of claim disclosed no cause of action and that the plaintiffs' action be dismissed with costs. The magistrate found for the plaintiffs and the defendant has appealed. The issue in this appeal was whether the amended statement of claim disclosed a reasonable cause of action.

Held, allowing the appeal:

(1) A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleadings are considered. The allegation by the plaintiffs that the defendant failed to deliver vacant possession by a reasonable time did not disclose a reasonable cause of action.

(2) The determination of a reasonable time is in each particular case, a question of fact. The state of things at the time when the notice was given must be considered.

(3) A written notice giving time to complete the delivery is necessary since time by which performance was to be completed has not been stipulated nor made the essence of the contract.

(4) The provisions of the Regulations do not apply to the defendant as it was an exempt body under s 2 of the Housing Developers (Control and Licensing) Act 1966.

[Bahasa Malaysia summary

Plaintif telah menuntut gantirugi untuk menghantar serah milikan kosong yang terlewat untuk sebuah unit rumah pangsa yamg telah dibeli daripada defendan mengikut suatu perjanjian jualbeli. Perjanjian itu tidak menyatakan tarikh untuk menghantar serah milikan kosong dan di dalam kes ini, milikan hanya diberi setelah lebih daripada tiga setengah tahun selepas penyempurnaan perjanjian itu. Di dalam pernyataan tuntutan yang dipinda, plaintif telah berhujah bahawa milikan kosong mesti dihantar serahkan dalam masa yang munasabah dan mereka bergantung kepada tempoh masa 24 bulan di bawah Peraturan-Peraturan Pemaju Perumahan (Kawalan dan Pelesenan) 1982 ('Peraturan itu'). Defendan telah membalas bahawa pernyataan tuntutan yang dipinda itu tidak menyatakan sebarang kausa tindakan dan tindakan plaintif itu hendaklah ditolak dengan kos. Isu di dalam rayuan ini adalah sama ada pernyataan tuntutan yang dipinda itu mendedahkan suatu kausa tindakan yang munasabah.

Diputuskan, membenarkan rayuan itu:

(1) Kausa tindakan yang munasabah bermakna suatu kausa tindakan yang mempunyai peluang kejayaan apabila hanya tuduhan-tuduhan di dalam pliding itu dipertimbangkan. Tuduhan plaintif bahawa defendan telah gagal menghantar serah milikan kosong dalam masa yang munasabah tidak mendedahkan suatu kausa tindakan yang munasabah.

(2) Penentuan masa yang munasabah di dalam sesuatu kes tertentu adalah suatu soalan fakta. Suasana keadaan pada masa notis itu diberi perlu dipertimbangkan.

(3) Suatu notis bertulis yang memberi masa untuk menyempurnakan hantar serah itu diperlukan kerana had tempoh masa di mana perlaksanaan mesti disempurnakan tidak diperuntukkan ataupun dijadikan sebagai suatu terma yang penting di dalam kontrak itu.

(4) Peruntukkan-peruntukkan Peraturan itu tidak terpakai kepada defendan kerana defendan merupakan suatu badan yang dikecualikan di bawah s 2 Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966.]

Cases referred to

1 *Drummond-Jackson v British Medical Association & Ors* [1970] 1 WLR 688 (refd)
2 *Stickney v Keeble & Anor* [1915] AC 386 (folld)
3 *Green v Sevin* (1879) 13 Ch D 589 (folld)
4 *Raineri v Miles & Anor* [1980] 2 All ER 145 (refd)
5 *Quah Ban Poh v Dragon Garden Pte Ltd* [1985] 2 MLJ 159 (refd)

Legislation referred to

Contracts Act 1950 s 47

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Lim Ewe Hock (*Lim Kean Chye*) for the appellant.
Lim Boo Chang (*Lim Boo Chang & Co*) for the respondents.

Cur Adv Vult

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Mohamed Dzaiddin J: This is an appeal from the decision of the magistrate in Georgetown given on 20 January 1987 who held that the plaintiffs had established a reasonable cause of action against the defendant in their amended statement of claim. The plaintiffs' claim in the action is for damages for late delivery of vacant possession of a unit of flat known as Flat C No 17.6, Macallum Street Ghaut Slab Block GT7 ('the said flat') which they purchased from the defendant for RM62,000. The parties executed a sale and purchase agreement on 25 October 1982. It is common ground that the said agreement was silent regarding the date of delivery of vacant possession. Nonetheless, the delivery of vacant possession of the said flat was finally made by the defendant to the plaintiffs on 22 January 1986 D which was more than three and a half years after the execution of the sale and purchase agreement.

By their amended statement of claim, the plaintiffs averred in para 4 that vacant possession of the said flat must be delivered within a reasonable time. In this context, the plaintiffs relied on the 24 months' period under the Housing Developers (Control and Licensing) Regulations 1982 ('the E Regulations') as a reference to determine the issue of reasonable time. Hence, by para 5, the plaintiffs alleged that, in consequence of the averment in para 4, the defendant had failed to deliver vacant possession within a reasonable time which was 455 days exceeding the reasonable time period of 24 months. In the premises, they claimed to have suffered loss and damage.

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The defence of the defendant was that the amended statement of claim disclosed no cause of action and the plaintiff's action be dismissed with costs.

In the appeal before me, the same point was taken up by Encik Lim Ewe Hock, aside from two other grounds as stated in the memorandum of G appeal. So, the crucial issue in this appeal is quite simple and straightforward, which is, whether the amended statement of claim discloses a reasonable cause of action.

A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleadings are considered (per H Lord Pearson in *Drummond-Jackson v British Medical Association & Ors*[1]). Here, para 4 merely averred that the delivery must be made within a reasonable time which was to be determined by analogy to the Regulations. Paragraph 5 further alleged that the defendant had failed to deliver vacant possession within a reasonable time. Thus, have the two paragraphs of the amended statement of claim disclosed a reasonable cause of action to I enable the plaintiffs to succeed in their claim for damages? In my judgment, there is none.

First, it is common ground that the written agreement did not fix any time for the performance of the contract. So when no time is specified, the

contract must be performed within a reasonable time — s 47 Contracts Act 1950. What is 'a reasonable time' is, in each particular case, a question of fact (ibid). However, the plaintiffs cannot arbitrarily fix the time. It must be reasonable having regard to the state of things at the time when notice was given. In *Stickney v Keeble*,[2] the English House of Lords held as follows:

> Where in a contract for the sale of land the time fixed for completion is not made of the essence of the contract, but the vendor has been guilty of unnecessary delay, the purchaser may serve upon the vendor a notice limiting a time at the expiration of which he will treat the contract as at an end, and in determining the reasonableness of the time so limited the court will consider not merely what remains to be done at the date of the notice, but all the circumstances of the case, including the previous delay of the vendor and the attitude of the purchaser in relation thereto.

Secondly and more importantly, the amended statement of claim has failed to plead that the plaintiffs have given notice to the defendant to complete the delivery of vacant possession within a reasonable time. What had been pleaded was merely an allegation that the defendant had failed to deliver vacant possession within reasonable time (para 5). In my opinion, a written notice giving time to complete the delivery is necessary since time by which the contract was to be completed has not been stipulated, nor made the essence of the contract. According to 9 *Halsbury's Law of England* (4th Ed) para 485:

> In cases where time is not originally of the essence of the contract, or where a stipulation making time of the essence has been waived, time may be made of the essence, where there is unreasonable delay, by a notice from the party who is not in default fixing a reasonable time for performance and stating that, in the event of non-performance within the time so fixed, he intends to treat the contract as broken. The time so fixed must be reasonable having regard to the state of things at the time when the notice is given, and to all the circumstances of the case.

In *Green v Sevin*,[3] Fry J stated at p 599:

> One of the earliest cases on this doctrine of engrafting time by notice is *Taylor v Brown* 2 Beav 180, and there Lord Langdale, the then Master of the Rolls, expressed his view in this way: 'Where the contract and the circumstances are such that time is not in this court considered to be of the essence of the contract — in such case, if any unnecessary delay is created by one party, the other has a right to limit a reasonable time within which the contract shall be perfected by the other.' So in *King v Wilson* 6 Beav 124, the same Master of the Rolls laid down the principle in these words: 'Though time may not be of the essence of a contract, yet where there is great and improper delay on one side, the other party has a right to fix a reasonable time within which the contract is to be completed.' So again, in *Pegg v Wisden* 16 Beav 239, Sir John Romilly said: 'I concur also in the decisions, that where time is not originally of the essence of the contract, it may, in the case of improper delay, be made so by notice.'

Encik Lim Boo Chang, counsel for the respondent, submitted that failure to issue a notice fixing a reasonable time was not fatal. He relied on *Raineri v Miles*[4] and *Quah Ban Poh v Dragon Garden Pte Ltd.*[5] After examining both decisions, I find they do not support the respondent's case. One of the issues in *Raineri*[4] was the effect of service of completion notice calling on the

A appellants to complete their contract of sale, and in *Quah Ban Poh*,[5] it was held, inter alia, that if the defendant had wanted to make time again of the essence of the contract, it should have given the plaintiff a notice fixing a reasonable time within which he must pay the last instalment.

Therefore, for the reason that the amended statement of claim has failed to plead the vital issue of notice fixing a reasonable time, it is my conclusion B that the amended statement of claim has not disclosed a reasonable cause of action.

Thirdly, the learned magistrate was wrong in law to accept the provision of r 12(1) of the Regulations as a 'reference to determine the question of reasonable time'. I am satisfied that the defendant, being an exempt body C under s 2 of the Housing Developers (Control and Licensing) Act 1966 (Rev 1973), the provisions of cl 18(1) of Sch E of the Regulations do not apply to them.

For the above reasons, this appeal is allowed with costs.

Appeal allowed.

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Reported by Lim Chee Wee

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